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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

CLIFFORD B. ERNST, JR.,  
*Petitioner,*  
v.

INDIANA BELL TELEPHONE CO., INC. and  
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 5703,  
*Respondents.*

**BRIEF OF COMMUNICATIONS WORKERS OF  
AMERICA LOCAL 5703 IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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### ISSUES PRESENTED

- (1) Should this Court review the issue of whether its decision in *Del Costello v. Teamsters*, — U.S. —, 103 S.Ct. 228 (1982) should be applied retroactively in light of the facts that even without retroactive application the decision dismissing the Petitioner's claim against the Union would not be reversed since the Court of Appeals affirmed the District Court's dismissal on the merits and the Petitioner did not raise the issue of retroactivity in the court of appeals?
- (2) If the Petitioner is attempting to review the issue of whether Section 503 of the Rehabilitation Act provides a private right of action against a labor union, should this Court review that issue in light of the facts that no such claim was pleaded in the original complaint and there is no conflict between the Court of Appeal's decision on that issue and any decision of this court or any other Court of Appeal?

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Respondent, Communications Workers of America, Local 5703 (hereafter "Union" or "Local 5703") opposes the Petition for Writ of Certiorari filed by Petitioner, Clifford B. Ernst, Jr., and for the reasons set forth herein, respectfully prays that the Petition be denied.

**REASONS WHY THE WRIT SHOULD BE DENIED**

**A. Reasons Why The Writ Should Be Denied With Respect To Petitioner's Claim That This Court's Decision In *Del Costello v. Teamsters* Should Not Be Applied Retroactively.**

On June 8, 1983, this Court announced its decision in the case of *Del Costello v. Teamsters*, — U.S. —, 103 S.Ct. 228 (1983). In that case the Court held that the

six-month statute of limitation contained in Section 10 (b) of the National Labor Relations Act should be applied to an action against a labor union for breach of the duty of fair representation.

To the knowledge of counsel for the Respondent Union, three Circuit Courts of Appeals have addressed the issue of retroactive application of this Court's decision in *Del Costello*. The Courts of Appeals for the Third and Eleventh Circuits after careful consideration held that *Del Costello* should be applied retroactively. *Perez v. Dana Corp.*, — F.2d —, 114 LRRM 2814 (3d Cir. 1983); *Rogers v. Lockheed-Georgia Co.*, — F.2d —, No. 81-7810 (11th Cir. Dec. 5, 1983). The Ninth Circuit in *Edwards v. Teamsters Local 36*, — F.2d —, 114 LRRM 3227 (9th Cir. 1983), ruled that *Del Costello* should not be applied retroactively. Thus, there admittedly exists a split among the Courts of Appeals with respect to the issue being presented by the Petitioner in the case *sub judice*. We urge, however, that for the reasons set forth below, the present case is clearly an inappropriate case for resolving that conflict.

1. ***Even if the Court Should Rule That the Petitioner's Breach of Duty of Fair Representation Claim Was Not Time-Barred, That Would Not Alter the Final Result Since the Court of Appeals Affirmed Dismissal of That Claim on the Merits.***

As the Petition clearly shows, the Petitioner is, in essence, seeking to have this Court review the manner in which a union attorney exercised her discretion in presenting his grievance to an arbitrator. This is clearly no basis for the granting of a writ of *certiorari*. The District Court found and the Court of Appeals affirmed that, as a matter of law, based upon the undisputed facts, the Union did not breach its duty of fair representation. Thus, even if this Court should rule that that claim was not time-barred, the result would nevertheless



be the same; the breach of duty of fair representation claim would stand dismissed.

**2. *The Petitioner May Not Raise the Issue of Retroactivity in a Petition for Writ of Certiorari for the Reason that that Issue Was Not Raised in the Court of Appeals.***

The general rule in this Court is that a party may not obtain review of an issue which was not raised in the lower courts. See, e.g., *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981); *Neely v. Martin K. Eby Construction Co.*, 366 U.S. 317 (1967).

The appeal in this case was argued in the Court of Appeals on June 9, 1983. At that time the panel as well as counsel for the Petitioner were apprised of the previous day's decision in *Del Costello v. Teamsters*, and served with copies of that decision. No objection to retroactive application of that decision was made during oral argument. Under the Local Rules of the Seventh Circuit the issue of retroactive application of *Del Costello* could have been raised subsequent to oral argument in two ways. Circuit Rule 11 provides that a party may provide the Court with additional authority after oral argument and Circuit Rule 16 provides for petitions for rehearing. The Petitioner in this case could have raised the issue of retroactive application of *Del Costello* under either of these rules but did not. For this reason alone *certiorari* should be denied.

**B. Reasons Why The Writ Should Be Denied With Respect To Petitioner's Second Claim That He Has An Implied Right To Bring A Private Action Pursuant To Section 503(a) Of The Rehabilitation Act Of 1973 As Amended.**

In his original Complaint the Petitioner did not allege any facts which even arguably relate to an allegation of discrimination on the basis of handicap as against the



Union. Moreover in his Petition for Writ of Certiorari it does not appear that he is seeking review of the question of whether a private right of action exists as against a labor union under Section 503(a) of the Rehabilitation Act of 1973 as Amended, 29 U.S.C. § 793(a).<sup>1</sup>

In any event, to the knowledge of counsel for the Respondent, it has been the unanimous holding of all Courts of Appeal which have addressed the issue that Section 503(a) does not provide a private right of action. See, e.g., *Beam v. Sun Ship Building & Dry Dock Co.*, 679 F.2d 1077 (3d Cir. 1982); *Fisher v. City of Tucson*, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 178 (1982); *Simon v. St. Louis County*, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980); *Rogers v. Frito Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980), *cert. denied*, 449 U.S. 889 (1980); *Hoopes v. Equifax, Inc.*, 611 F.2d 134, 135 (6th Cir. 1979); see also, *Prewitt v. United States Postal Service*, 662 F.2d 292, 302 (5th Cir. 1981) which holds that a private right of action does exist under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Thus, if Petitioner is seeking review of whether he possesses a private right of action under Section 503 as against a labor union, *certiorari* should be denied.

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<sup>1</sup> Section 503 of the Vocational Rehabilitation Act of 1973 as Amended, provides that contracts in excess of \$2,500 entered into by any Federal departments or agencies for the procurement of personal property and non-personal services must contain a provision requiring that the contracting party take affirmative action to employ qualified handicapped individuals. 29 U.S.C. § 793(a). This obviously has no relevance to Petitioner's claims against the Union.

**C. There Is No Basis For Granting *Certiorari* With Respect To The Issue Of Whether The District Court Ignored Genuine Issues Of Material Fact In Granting Summary Judgment.**

There is absolutely no basis for granting *certiorari* in order to determine if the District Court erred in granting summary judgment due to the existence of genuine issues of material facts. As a threshold consideration, this issue simply lacks the degree of general public importance to warrant exercise of this Court's jurisdiction. *Certiorari* should be denied for that reason. See, e.g., *Gordon v. New York Stock Exchange*, 422 U.S. 659, 663 (1975); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955). Moreover, review of that issue would contravene this Court's well-founded policy of avoiding review of "evidence and discuss[ion] of specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1924). It is well-established that this Court will ordinarily refuse to grant *certiorari* in order to review a lower court's finding or consideration of factual issues. *Berenyi v. Director, Immigration and Naturalization Services*, 385 U.S. 630, 635 (1966).

**CONCLUSION**

For the reasons set forth above, the Petition for Writ of *Certiorari* should be denied as to all issues.

Respectfully submitted,

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